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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
AND FOR THE NORTHERN DISTRICT OF CALIFORNIA
UNITED STATE DISTRICT COURT COMPOSED OF THREE JUDGES
PURSUANT TO SECTION 2284, TITLE 28 UNITED STATES CODE

RALPH COLEMAN, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

Case No. CIV S-90-0520 LKK JFM P

THREE JUDGE COURT

MARCIANO PLATA, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

Case No. C01-1351 TEH

THREE JUDGE COURT

**RECEIVER'S STATEMENT
REGARDING DISCOVERY DISPUTE**

Date: July 10, 2007

Time: 11:00 a.m.

Courtroom: 12

J. Clark Kelso, Receiver for the California Prison Medical System ("Receiver"), submits
this Statement Regarding Discovery Dispute.

PRELIMINARY STATEMENT¹

Pursuant to the Order Appointing Receiver ("OAR"), entered in *Plata et al. v. Schwarzenegger et al.*, C01-1351 TEH (Northern District of California) ("*Plata*"), the Receiver exercises "all powers vested by law in the Secretary of the CDCR as they relate to the administration, control, management, operation, and financing of the California prison medical health care system. The Secretary's exercise of the above powers is suspended for the duration of the Receivership." Exhibit A to Dodd Decl., p. 4. Among the powers conferred on the Receiver is the "power to hire, fire, suspend, supervise, promote, transfer [and] discipline" medical personnel. Id. As a result of the foregoing provisions, among others, all medical staff in the prisons report to the Receiver and are ultimately directed by the Receiver. They do not report to CDCR custodial staff. The Receiver is not, and never has been, a party to this three-judge Court proceeding.

In carrying out his duties, "the Receiver and his staff . . . have the status of officers and agents of [the Plata] Court, and as such shall be vested with the same immunities as vest with [the] Court." Id., p. 6. Thus, in two orders issued in this proceeding, the Court has prohibited efforts to take discovery from the Receiver on grounds of immunity. See Exhibits B and C to Dodd Decl. Nevertheless, the Receiver has cooperated with the parties when they have required information pertinent to discovery. Thus, the Receiver cooperated in the last round of plaintiffs' expert tours of the prisons in the Fall of 2007. Those inspections involved more than a dozen facilities throughout the State and required the Receiver, on extremely short notice, to direct representatives to attend such inspections, sometimes including visits to more than one prison in a single day.

On July 7, 2008, the Receiver received, via facsimile transmission, a copy of Plaintiffs' Third Request for Inspection ("Third Request") in *Plata*. The Third Request had not previously been served on the Receiver. It purports to schedule inspections at the following prisons on the following dates: North Kern State Prison (July 14); SATF (July 15); Pleasant Valley (July 16); CSP-Solano (July 17); High Desert (July 18). Among other things, the Third Request indicates

¹ The facts stated herein are based on the Declaration of Martin H. Dodd ("Dodd Decl."), filed herewith.

1 that plaintiffs' experts will "interview . . . the prison's highest ranking medical and mental health
 2 officers, including, when applicable, the Chief Medical Officer, Chief Physician & Surgeon and
 3 Director of Nursing; "will confer with . . . medical staff" and will seek to review unit health
 4 records for some unspecified number of unidentified patient inmates. There is no dispute that,
 5 pursuant to the OAR, the medical personnel at the prisons are neither controlled by, nor
 6 answerable to, the defendants. Instead, they report ultimately to the Receiver.

7 On July 8, 2008, the Receiver sent a letter to plaintiffs' counsel objecting to the
 8 Inspections on various grounds. *See* Exhibit D to Dodd Decl.

9 On July 9, 2008, the Receiver received, via facsimile transmission, a copy of Plaintiffs'
 10 Fourth Request for Inspection in *Plata*; the Receiver had previously received a copy of Plaintiffs'
 11 Fourth Request for Inspection in *Coleman et al. v. Schwarzenegger et al.*, Civ S 90-0520 LKK-
 12 JFM P, (Northern District of California) ("*Coleman*") (collectively "Fourth Requests"). The
 13 Fourth Requests purports to schedule inspections in *Plata* and *Coleman* at the following prisons
 14 on the following dates: California Substance Abuse Treatment Facility (July 21); California
 15 Correctional Institute (July 22); Correctional Training Facility (July 23); Corcoran State Prison
 16 (July 24); California State Prison, Los Angeles County, Lancaster (August 5); Salinas Valley
 17 State Prison (July 29); California Medical Facility (July 31); North Kern State Prison (July 31);
 18 and Mule Creek State Prison (August 1). Like the Third Request, the Fourth Requests call for
 19 prison inspections that will entail, in part, proposed interviews with the highest ranking medical
 20 officer at each prison including, when applicable, the Chief Medical Officer, Chief Physician and
 21 Surgeon or Director of Nursing and conferences with "medical staff."²

22 Plaintiffs already conduct tours, pursuant to prior orders in *Plata*, at every prison in the
 23 State, sometimes for as much as two days at each prison. As plaintiffs are acutely aware, the
 24 Receiver believes those tours are extremely burdensome, and require local medical staff to
 25 produce voluminous information about inmates and their medical care. One of these tours is
 26 scheduled for Pleasant Valley State Prison on July 15 and July 16, 2008. Despite these ongoing

27
 28 ² Plaintiffs state that the Receiver was served with a Third Inspection Request in *Coleman* on July 2, 2008. Not so. The Receiver has never seen it.

1 tours, plaintiffs have attempted to schedule yet more tours so that their experts can interview
2 medical staff who report to the Receiver.

3 For the following reasons, the Receiver opposes the all of Plaintiffs' Requests for
4 Inspection and respectfully requests that this Court not permit the inspections as proposed to
5 proceed.

6 ARGUMENT

7 A. Testimonial Discovery Is Not Permitted From The Receiver And His Staff.

8 The three-judge Court has issued two orders which make it abundantly clear that
9 testimonial discovery from the Receiver and his staff will not be permitted in this matter. On
10 November 29, 2007, this Court issued a protective order barring the deposition of the Receiver
11 based on immunity. Exhibit B to Dodd Decl. p. 2:11-12. Further, the three-judge Court's June 5,
12 2008, Order specifically states that no party to these proceedings is permitted "to request formal
13 testimony from the Receiver . . . or any of their staff members at any stage of these proceedings."
14 Exhibit C to Dodd Decl. p. 2:6-10.

15 Notwithstanding the clear intent of the three-judge Court to preclude discovery from the
16 Receiver and his staff, plaintiffs seek interviews with senior medical staff at the prisons, and seek
17 to confer with medical staff generally. The purportedly informal "interviews" with the senior
18 medical staff at each prison is effectively an end run on the prohibition against testimonial
19 discovery. If formal discovery from the Receiver is not permitted, then surely plaintiffs should
20 not be permitted to conduct informal discovery from the Receiver's staff that may form the basis
21 for expert opinions.³

22 B. Discovery Served By Plaintiffs On The Receiver Is Not Effective As The Receiver Is 23 Not A Party To This Action.

24 Leaving aside the immunity of the Receiver and his staff, a close reading of Plaintiffs'
25 Statement Regarding Discovery reveals a fundamental flaw in plaintiffs' reasoning. When
26 arguing that the interviews are not only necessary, but effectively required, they repeatedly refer
27 to "defendants" and "defendants'" discovery obligations. See Pltffs. Statement, pp. 7-8. The

28 ³ The plaintiffs can visit the prisons, but they should not be permitted to take discovery from the Receiver's staff.

1 short answer to this is that the Receiver is not a defendant in this or any other matter and has no
 2 discovery obligation to plaintiffs as a party. The Receiver is not a party to the three-judge Court
 3 proceeding and never has been. The local medical staff report to the Receiver -- not to
 4 defendants. Accordingly, discovery served on the defendants is not effective to require the
 5 Receiver or his staff, including medical personnel, to provide the requested information or
 6 otherwise to respond to the discovery. Discovery directed at the defendants, and mailed to the
 7 Receiver as a non-party, is ineffective to compel the Receiver's compliance.

8 **C. The Receiver Should Not Be Expected To Accommodate Plaintiffs' Burdensome**
 9 **Inspection Requests.**

10 **1. Plaintiffs have failed to justify the need interfere with the Receiver's staff.**

11 The Receiver complies with the many tours plaintiffs conduct pursuant to *Plata*
 12 compliance monitoring. Several months ago, Plaintiffs conducted quite a few (also hastily
 13 arranged) inspections by Plaintiffs' experts. The Receiver cooperated at that time, despite the
 14 fact that the inspections were intrusive, disruptive and required sending Receiver's
 15 representatives to prisons throughout the state, and sometimes to more than one prison in one
 16 day. The Receiver and his staff cannot be expected to continue to accommodate these
 17 burdensome inspections in the face of the many other competing, and significantly more critical,
 18 demands they must address each day. Plaintiffs may believe that the inspections are of supreme
 19 importance, but the Receiver and his staff have a job to do and that job is to bring the medical
 20 care system up to constitutional standards. They ought not be distracted from that job by
 21 depositions disguised as informal interviews.

22 **2. Even if the requested inspections are permitted, adequate notice must be**
 23 **provided to the Receiver.**

24 The Receiver first received the Inspection Request on July 7, 2008, barely a week before
 25 the inspections are scheduled to begin.⁴ The proposed "interviews" of senior medical staff,

26
 27 ⁴ Alison Hardy called counsel for the Receiver on July 7, 2008 to discuss this Inspection Request and acknowledged
 28 that the failure to serve the Receiver was "a fairly significant screw up" (or words to that effect). While the Receiver
 appreciates the recognition that the failure to provide adequate notice was unjustifiable, it does nothing to relieve the
 extreme and unnecessary burden on the local medical staff.

1 conferences with other medical staff on an ad hoc basis, and demands that staff locate and
 2 retrieve medical records for an unspecified number of inmates will interfere with the important
 3 work in which local medical staff are engaged on a daily basis. In addition to the ongoing
 4 delivery of care, the Receiver has commenced several initiatives to improve care at the local
 5 level, which initiatives are themselves making extraordinary demands on prison medical
 6 personnel. It will be unduly disruptive to conduct the proposed inspections, with their attendant
 7 demands on local medical staff, particularly on such short notice. Local medical staff cannot be
 8 expected to drop everything else that they are doing to comply with such improper discovery
 9 requests.

10 CONCLUSION

11 For all the foregoing reasons, this Court should deny all of Plaintiffs' Requests for
 12 Inspection in both *Plata* and *Coleman*, at least insofar as they seek interviews or consultation
 13 with, or demands for assistance by, prison medical staff.

14
 15
 16 Dated: July 9, 2008

FUTTERMAN & DUPREE LLP

17
 18 By: /s/ Martin H. Dodd
 19 Martin H. Dodd
 20 Attorneys for Receiver J. Clark Kelso
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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman & Dupree LLP, 160 Sansome Street, 17th Floor, San Francisco, CA 94104. I am over the age of 18 and not a party to the within action.

I am readily familiar with the business practice of Futterman & Dupree, LLP for the collection and processing of correspondence.

On July 9, 2008, I served a copy of the following document(s):

RECEIVER'S STATEMENT REGARDING DISCOVERY DISPUTE

by placing true copies thereof enclosed in sealed envelopes, for collection and service pursuant to the ordinary business practice of this office in the manner and/or manners described below to each of the parties herein and addressed as follows:

— BY FACSIMILE: I caused said document(s) to be transmitted to the telephone number(s) of the addressee(s) designated.

X BY MAIL: I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated below. I am readily familiar with Futterman & Dupree's practice for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.

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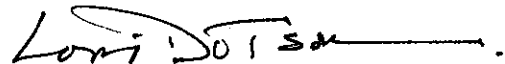
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19 I declare that I am employed in the offices of a member of the State Bar of this Court at
20 whose direction the service was made. I declare under penalty of perjury, under the laws of the
21 united State of America, that the above is true and correct.

22 Executed on July 9, 2008 at San Francisco, California.

23 

24 Lori Dotson